VOELLER ET AL. *v.* NEILSTON WAREHOUSE CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 97. Submitted December 18, 1940.—Decided January 6, 1941.

A state statute providing that, where a corporation authorizes the sale or other disposition of all or substantially all of its assets, a dissenting shareholder shall have the right to be paid the fair cash value of his shares, and that the amount demanded of the corporation by the dissenting shareholder as such fair cash value shall, after six months,—if the corporation does not make a counter-offer, request an appraisal, or abandon the sale—"conclusively be deemed to be equal to" the fair cash value, *held,* in its operation as to majority stockholders, not a deprivation of their property without due process in violation of the Fourteenth Amendment, although the statute made no provision for notice to them as individuals, or opportunity for them to be heard, in respect to the dissenting stockholder's demand. P. 535.

The corporation sufficiently represents the majority stockholders, for the purposes of notice and of invoking the jurisdiction of this Court on the constitutional question. P. 537.

136 Ohio St. 427; 26 N. E. 2d 442, reversed.

CERTIORARI, *post,* p. 624, to review a judgment denying recovery to minority stockholders upon a state statute held unconstitutional.

Messrs. Carrington T. Marshall and *Orland R. Crawfis* submitted for petitioners.

Mr. Francis J. Wright submitted for respondents.

A statute creating a presumption which operates to deny a fair opportunity to rebut it deprives of due process. *Heiner* v. *Donnan,* 285 U. S. 312, 329; *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Bailey* v. *Alabama,* 219 U. S. 219. So in the case even of *prima facie* presumptions. *Manley* v. *Georgia,* 279 U. S. 1; *Western & Atlantic Railroad* v. *Henderson,* 279 U. S. 639.

The controversy here is between two classes or groups of shareholders, dissenting and non-dissenting; and only their individual rights are involved. *Geiger* v. *American Seeding Machine Co.*, 124 Ohio St. 222. The corporation, being in liquidation, was a mere stakeholder for the shareholders.

The majority shareholders, though they voted in favor of the sale and knew that certain votes were cast against it, were not charged with notice of further proceedings taken pursuant to § 8623–72. Section 8623–65 and § 8623–72 are separate and distinct; the former deals with corporate action taken by shareholders, the latter with the rights of shareholders. Merely because certain shareholders dissented to certain corporate action, it does not follow that they will file demands under § 8623–72; or that, if filed, the demands will be rejected.

The majority shareholders, though they knew of the authorization of the sale, were not bound to keep themselves advised as to further proceedings by the dissenters.

It is elementary that the board of directors is not the representative of the shareholders as respects their individual rights but only in corporate matters. Especially is this so when the corporation is in liquidation and nothing remains to be done except distribute the assets to the shareholders. Only they, and as individuals, are interested in the method of distribution. Since only the individual rights of shareholders *inter se* were involved, they were themselves entitled to notice. Notice to the corporation was not notice to the shareholders.

Even if it be assumed that they had notice, the majority stockholders still were powerless to act and without opportunity to be heard.

The Supreme Court of Ohio has held that suggested procedure by shareholders in behalf of the corporation was not available to the majority shareholders, and that they had no standing to maintain such an action.

This is a decision on the procedural law of Ohio which will be accepted by this Court. Moreover, the state court has held that majority shareholders can not maintain an action the object of which is to have the fair cash value of dissenters' shares determined, this being limited by the statute to the corporation and the dissenters. This also is a purely procedural matter governed solely by the law of Ohio.

MR. JUSTICE BLACK delivered the opinion of the Court.

We granted certiorari in this case to review a decision of the Supreme Court of Ohio invalidating a state statute on the ground that it constituted a denial of procedural due process guaranteed by the Fourteenth Amendment.[1] The statute in question provided that the value placed upon his stock by a dissenting shareholder should, after six months and under certain circumstances, "conclusively be deemed to be equal to" the fair cash value.[2] The state court held that since the statute required that the demands of the dissenters be made known only to the corporation, the majority shareholders were unconstitutionally deprived of property without notice and an opportunity to be heard.

Concretely, the question was raised here in the following manner: Petitioners, holders of stock in respondent corporation, were among those who dissented when a vote was called on a sale of substantially all the corporate assets. Two-thirds of the shareholders voted for the sale, which was thereupon consummated. Petitioners gave written notice to the corporation of their objection, the number of shares they held, and the claimed fair cash value of their stock. The corporation refused in writing to pay the amount asked, but made no counter-

[1] 136 Ohio State 427, 26 N. E. 2d 442.

[2] Ohio Code Ann. (Throckmorton, 1940) § 8623-72, paragraph 7.

offer. Neither party filed a petition for appraisal. After six months had elapsed, petitioners filed suit in the Court of Common Pleas, asking that judgment be rendered in their favor for the amounts originally claimed.

All of these proceedings were in accordance with the applicable Ohio law.[3] In their suit, petitioners relied on a section of that law which provided that the value claimed by the dissenting shareholders should "conclusively be deemed to be equal to" fair cash value if the corporation had neither made a counter-offer nor requested an appraisal.[4] One of the majority shareholders filed an intervening petition on behalf of herself and all other shareholders similarly situated, alleging that the section of the statute involved was unconstitutional. A judge of the Court of Common Pleas struck out this intervention at the request of petitioners, saying that the statute was constitutional, the petition for intervention irrelevant, and the majority shareholders without standing to intervene.[5] No appeal was taken from this ruling. When the case came on for trial on the merits, a different judge sat, and it was his opinion that the statute was unconstitutional. The Court of Appeals, one judge dissenting, reversed the trial court, and was itself reversed, two judges dissenting, by the Supreme Court of Ohio.

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[3] Ohio Code Ann. (Throckmorton, 1940) §§ 8623–65, 8623–72.

[4] The exact language is: "If such petition [for appraisal] is not filed within such period, the fair cash value of the shares shall conclusively be deemed to be equal to the amount offered to the dissenting shareholder by the corporation if any such offer shall have been made by it as above provided, or in the absence thereof, then an amount equal to that demanded by the dissenting shareholder as above provided."

[5] The judge said: "The failure to take advantage of the statutory provisions may result unfortunately for other stockholders, but their remedy would be against those directors who were derelict in their duty."

It was the opinion of the Supreme Court that the statute had "an unconstitutional operation against the majority stockholders, as being violative of the due process section of the Fourteenth Amendment to the federal Constitution." And the correctness of that conclusion is the only question properly before this Court. All other questions presented involve state law, for the conditions under which corporations shall organize and operate are matters within the exclusive province of the state, so long as those conditions do not clash with the national Constitution.

We agree with petitioner's position that notice to the corporation of the demand for payment constituted notice to the majority stockholders, and that such notice was an adequate compliance with the constitutional requirement of due process. The objective of the Ohio statute permitting the right of appraisal to dissenting shareholders was the elimination of abuses that had long been a fixture in the field of corporate finance.[6] To assure that the right to appraisal would be promptly resorted to and to provide for the contingency that in some cases no such resort would be taken, the Ohio legislature thought it advisable to provide that under some circumstances the original offer or counter-offer should

[6] At common law, unanimous shareholder consent was a prerequisite to fundamental changes in the corporation. This made it possible for an arbitrary minority to establish a nuisance value for its shares by refusal to coöperate. To meet the situation, legislatures authorized the making of changes by majority vote. This, however, opened the door to victimization of the minority. To solve the dilemma, statutes permitting a dissenting minority to recover the appraised value of its shares, were widely adopted. See S. E. C. Report on the Work of Protective and Reorganization Committees, Part VII, pp. 557, 590. The Ohio appraisal statute here in issue was not adopted until after respondent had acquired its charter, but the Ohio Constitution expressly reserves to the state the right to alter or repeal the corporate law. Ohio Const., Art. 13, § 2.

conclusively be deemed equal to the fair cash value. The corporation was given the right to avoid the effect of being compelled to pay the claimed value either by making a counter-offer or by requesting an appraisal. In addition, it was given the right to avoid both appraisal and payment of the claimed value by abandoning its original purpose to sell its assets. The dissenting shareholders could, by requesting an appraisal, likewise avoid accepting the corporation's counter-offer. Thus the corporation is compelled to pay or the dissenting shareholder to accept payment of the amount of the offer or counter-offer only if none of the many available alternatives are pursued before the expiration of a six-month period. The provisions, in effect, operate as statutes of limitations. After the lapse of a period of time, given defenses—attacks on value—can no longer be asserted.

It is true, as respondent urges, that after the majority authorizes the corporation to effect a sale, the alternatives are thereafter expressly open only to the corporation and the dissenters; no provision is made for notice to the majority shareholders as individuals. But the majority, by their vote approving the sale of assets, have indicated their intention to remain part and parcel of the corporation; the dissenters, on the other hand, by voting against the sale and by demanding payment, have indicated an intention to sever relationships. If thereafter the failure of the directors to make a counter-offer materially prejudices the financial stake of the majority, it is no more a want of due process to consider the majority bound thereby than it is to consider them bound by any other act of management. The majority are participants in a corporate enterprise. In entrusting their capital to the corporation, they accept the disadvantages of the corporate system along with its advantages. What is claimed to be a disadvantage here is a necessary con-

comitant of the system and its most distinctive attribute—representation of the collective interest of shareholders by selected corporate management.

The constitutional issue is here raised for the majority shareholders by the corporation, which admittedly itself had notice. Exercising the very delicate responsibility of passing upon the validity of state statutes, this Court has many times declared the rule that only those who have been injured as the result of the denial of constitutional rights can invoke our jurisdiction on constitutional questions.[7] Yet here the corporation would have us say that it is sufficiently the representative of the majority to raise in their behalf the constitutional issue, but not sufficiently their representative to receive notice. We hold that, so far as the constitutional requirement of due process is concerned, it is in this case sufficiently their representative for both purposes, and accordingly we find it necessary to reverse the judgment below.[8]

There is nothing unusual in such a holding; the rights of parties are habitually protected in court by those who act in a representative capacity; an executor or administrator may act for the beneficiaries of an estate; a receiver may represent the collective interests of stockholders, partners, or creditors; a lawyer may appear for his clients; and a corporation may represent the collective interests of its shareholders. In this case, in fact, the unappealed ruling of the trial judge on the attempted intervention by the majority stands as an adjudication that in those respects here material the majority had committed their interests to the corporation itself.

Reversed.

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[7] *Tyler* v. *Judges*, 179 U. S. 405; *Hendrick* v. *Maryland*, 235 U. S. 610, 621. And see Mr. Justice Brandeis, concurring, in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 347–348, and cases there cited.

[8] *Christopher* v. *Brusselback*, 302 U. S. 500, 504; cf. *Kersh Lake Drainage District* v. *Johnson*, 309 U. S. 485, 491.